

In the Matter of )  
)  
TIME WARNER CABLE, )  
A Division of )  
TIME WARNER )  
ENTERTAINMENT COMPANY, L.P. )  
)  
Emergency Petition for )  
Declaratory Ruling and Enforcement Order )  
For Violation of Section 76.58 of the )  
Commission's Rules, or in the Alternative )  
For Immediate Injunctive Relief )

To: **The Commission**<sup>1</sup>

**OPPOSITION TO "EMERGENCY PETITION FOR DECLARATORY RULING AND ENFORCEMENT ORDER, OR, IN THE ALTERNATIVE, FOR IMMEDIATE INJUNCTIVE RELIEF"**

Time Warner Cable ("Time Warner"), by its attorneys, hereby submits this opposition to the "Emergency Petition for Declaratory Ruling and Enforcement Order, Or, In the Alternative, For Immediate Injunctive Relief" ("Petition") filed with the Commission by ABC, Inc. ("ABC") on May 1, 2000. For the reasons set forth below, ABC's Petition must be denied.

**INTRODUCTION**

ABC, a company ultimately controlled by The Walt Disney Company ("Disney"), is the ultimate controlling parent of various televisions broadcast stations (the "ABC O&O Stations").

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<sup>1</sup>ABC properly addresses its Petition to the full Commission. Time Warner agrees that the issues raised in ABC's Petition are matters of first impression, and thus are not properly decided pursuant to delegated authority. See 47 C.F.R. § 0.283(b)(4)-(5), (10).

ABC is seeking to compel Time Warner to violate Section 325(b)(1) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §325(b)(1), by retransmitting various ABC O&O Stations on Time Warner cable systems operating in designated market areas ("DMAs") where such stations are located, without the benefit of a valid retransmission consent agreement between ABC and Time Warner. As will be shown below in Sections II and III, Section 614 (b)(9) of the Act does not override the prohibition in Section 325(b)(1) against retransmission of a broadcast station without an express agreement between the parties. Section 614 (b)(9) restricts the deletion or repositioning of must-carry stations during national audience survey, or "sweeps" periods. To the extent that provision applies at all to a station that has elected retransmission consent, it certainly does not apply after the expiration of the parties' retransmission consent agreement, as is the case here.

ABC's Petition would have the Commission believe that Time Warner "cynically" plotted out a scheme to put itself in the position of having no agreement to continue carriage of ABC's O&O Stations during the May Nielsen audience sweeps period. In fact, of course, it was ABC that insisted on setting May 1 as the date on which the retransmission consent agreement between the parties would expire. And it was ABC that repeatedly refused Time Warner's entreaties that the parties enter into a retransmission consent agreement that would have ensured Time Warner's right to carry ABC stations for the rest of the year, thereby guaranteeing the public's access to those stations and giving the parties a realistic opportunity to work out a long-term agreement.<sup>2</sup> Indeed, ABC's hypocrisy is on full display in its Petition, which makes

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<sup>2</sup>ABC has blatantly and intentionally sought to distort the facts and mislead the Commission in "quoting" from a letter from Time Warner's Senior Vice President of Programming, Fred Dressler, to Disney Channel President Anne Sweeney and ABC's Senior

abundantly clear that ABC's so-called "unconditional" grant of retransmission consent lasts only until the end of sweeps, after which time ABC apparently is unconcerned about the impact that its decision to deny Time Warner the right to carry ABC O&O Stations will have on its viewers.

ABC waived its ability to compel carriage of the ABC O&O Stations on or about September 10, 1999 when such stations elected retransmission consent instead of must carry.<sup>3</sup> Similarly, ABC waived the ability to assure carriage of the ABC O&O Stations through the May sweeps period when ABC itself proposed, only a month before, that the current retransmission consent agreement would expire at 12:01 am on May 1. Moreover, the relief sought by ABC is entirely within its own control. On April 19 and again on April 26, Time Warner extended ABC a written offer to enter into an agreement that would give Time Warner retransmission consent until January 1, 2000.

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Vice President and General Counsel, Alan N. Braverman. According to ABC, this letter contains an admission by Time Warner that it was refusing ABC's offer of an unreasonably short term extension out of a desire to "drag [its] customers - and [the ABC Stations'] viewers - into our commercial dispute." Not surprisingly, ABC has elected not to enclose a copy of the letter with its Petition, undoubtedly because it knew that anyone reading the letter would instantly recognize that ABC's characterization of its contents is utterly false. The letter does not even mention ABC's absurdly short extension proposal; rather the letter describes Time Warner's proposal that the parties enter into an "interim" retransmission agreement lasting eight months (i.e., through the end of the year). The letter ( a copy of which is attached as Exhibit A) states that

"This consent agreement provides enough time to bring closure to our negotiations without dragging our customers--and your viewers--into our commercial dispute." (Emphasis added).

In other words, Mr. Dressler's letter says exactly the opposite of what ABC claims it says and thus reveals all too clearly how far ABC is willing to go in its desperate attempts to manipulate the Commission's rules and processes to serve its corporate, not its viewers', interest.

<sup>3</sup> A representative retransmission consent election letter is attached as Exhibit B.

Throughout these negotiations, Time Warner has remained devoted to the principle of retaining the ability of its subscribers to receive the ABC O&O Stations, while resisting ABC's gamesmanship tactics. As demonstration of its commitment to put the public ahead of private commercial disputes, today Time Warner offered to ABC that the parties reinstate their former retransmission consent agreement for a period of anywhere from as long as ten years to as short as five-and-one-half months, at ABC's election. (Exhibit C). By signing Time Warner's retransmission consent proposal, ABC is in a position to restore Time Warner's ability to carry the ABC O&O Stations that ABC forced off of Time Warner's cable systems at 12:01 am, May 1.

#### **BACKGROUND**

In order to view this matter in its proper perspective, it is necessary to briefly outline the factual developments which have led ABC to deny Time Warner's cable subscribers access to popular ABC television stations. For the period October 6, 1993 through December 31, 1999, ABC's ABC O&O Stations were carried by Time Warner cable systems pursuant to a retransmission consent agreement between ABC and Time Warner dated August 9, 1993. (Exhibit D).

On or about September 10, 1999, various ABC O&O Stations exercised their right to elect between must-carry and retransmission consent for the upcoming three year period (January 1, 2000 through December 31, 2002) by electing retransmission consent. Time Warner and ABC engaged in serious negotiations prior to December 31, 1999, and were close to agreement on the substantive terms of a new retransmission consent deal. However, because a

binding contract had not been finalized, the parties agreed to a short-term extension of the previous retransmission consent agreement, through January 15, 2000. (Exhibit E).

By early January, Time Warner and ABC had reached an agreement on the key terms of a new, three-year retransmission consent contract. On January 10, 2000, however, the Time Warner/AOL merger was announced, and ABC's negotiation posture suddenly changed. ABC abruptly pulled its previous offer off the table, even though that offer had been accepted conceptually by Time Warner. Sensing that it could threaten opposition to the AOL/Time Warner merger to gain leverage in its retransmission consent negotiations, ABC has continued to up the ante with a succession of unreasonable demands. These demands would result in Time Warner incurring hundreds of millions of dollars in additional costs which would, almost certainly, result in higher rates for its customers. In addition, Disney and ABC have mounted an extensive public relations campaign against Time Warner to elicit more money and better channel positions for various Disney channels: ESPN, ESPN2, Lifetime, The Disney Channel, Toon Disney, and SoapNet, all linked to Time Warner's continued carriage of the ABC O&O Stations.

While the negotiations surrounding ABC's ever-escalating demands have ensued, Time Warner and its subscribers have remained at the mercy of ABC's willingness to offer only short-term agreements for mutually acceptable extensions of the prior retransmission consent agreement. Notably, throughout this period beginning on January 1, 2000, ABC has never offered to agree to an extension of the retransmission consent contract greater than one month.<sup>4</sup>

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<sup>4</sup>Thus, ever since January 1, ABC has forced Time Warner to remain in a position where it has had to continually advise subscribers that ABC might imminently decide to pull its O&O Stations, given the Commission's 30 day notice rule, 47 C.F.R. §76.309(c)(3)(i)(B). This makes

Subsequent to ABC's proposal of an initial short-term, 15 day extension (through January 15, 2000), a second extension was proposed by ABC for an additional month, through February 15, 2000. (Exhibit F). Facing the expiration of the agreement in the midst of the February audience sweeps, yet another short-term extension was then proposed by ABC, this time again for only 15 days, running through March 1, 2000, thereby assuring ABC that the ABC O&O Stations would continue to be carried through the end of the February sweeps. (Exhibits G and H). Just prior to the expiration of that extension, however, ABC employed a negotiation gambit designed to further leverage its undue bargaining power. ABC offered to enter into an additional one month extension of the agreement (through March 31, 2000) for all of the ABC O&O Stations, with the exception of one: Houston. (Exhibit I).

In Houston, ABC understood that the relatively flat terrain would allow television viewers to readily pick up ABC's local station with an off-air antenna, even if the station were no longer carried by Time Warner. Thus, ABC concluded that it had the least to lose by playing hard ball in Houston. Accordingly, ABC offered only a one day extension in Houston, instead of the one month extension proposed to for all the other ABC O&O Stations. After that, ABC proposed an amendment extending the retransmission consent agreement for a mere additional week, hoping to force Time Warner to accept ABC's unreasonable proposals to drive up the cost of numerous Disney programming services. (Exhibit J).

Time Warner declined to buckle under ABC's strong-arm tactics. As that expiration deadline became imminent, ABC turned up the pressure by offering only an additional 12 hour

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ABC's last offer of 24 days even more egregious - - Time Warner would be unable to satisfy the 30 day advance notice rule.

extension. (Exhibit K). Again, Time Warner refused to blink, and the parties agreed to another short-term extension of the retransmission consent agreement for Houston through March 31, bringing it back into sync with the retransmission agreements covering the other ABC O&O Stations. (Exhibit L). When that agreement was about to expire, ABC offered yet another proposed short-term extension of the retransmission consent agreement, covering all the ABC O&O Stations, through one minute after midnight on April 30, 2000. (Exhibit M). Thus, it was at ABC's initiative that this last extension was set to expire at 12:01 am, on May 1, after the May sweeps period had already begun.

Each of the "fire drill" short-term extensions insisted upon by ABC has imposed considerable burdens on Time Warner and its customers. Every time a retransmission consent expiration deadline approaches, Time Warner personnel have been forced to divert their attention from their substantial day-to-day responsibilities associated with the operation of Time Warner's cable business, thus interfering with Time Warner's ability to operate its business and provide optimal service to its customers. Instead, Time Warner employees have had to focus on preparations for the fallout that would result from ABC's pulling its O&O Stations. Such diversions include gearing up the customer service operations in order to respond to the anticipated deluge of customer questions seeking an explanation for ABC's anti-consumer actions, and arranging for substitute programming. Similarly, throughout this four-month period since January 1, Time Warner personnel have devoted extraordinary efforts to remain in compliance with Section 76.309(c)(3)(i)(B) of the Commission's rules, which requires that

customers will be notified of any changes in rates, programming services or channel positions as soon as possible through announcements on the cable system and in writing. Notice must

be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator.<sup>5</sup>

The posting of repeated messages regarding the potential imminent loss of ABC O&O Stations, followed by an eleventh-hour agreement regarding continued short-term availability of such stations has not only been extremely burdensome for Time Warner, it also has resulted in great consumer concern and confusion.<sup>6</sup> It has left many Time Warner subscribers wondering whether popular programs they desire will be denied to them by ABC. Indeed, ABC has taken advantage of this uncertainty by running advertisements in Houston that offered Time Warner customers financial incentives to switch to competing, direct-to-home satellite services.<sup>7</sup>

Given the massive disruption and confusion surrounding these repeated short-term retransmission consent extensions, on April 19 Time Warner proposed to ABC that any further extension run at least through the end of the year, thus clearly informing ABC that it was no longer willing to agree to any further month-to-month extensions. (Exhibit O). By extending retransmission consent through the end of the year, the parties then would be able to devote their full attention to business operations and customer service, while at the same time continue negotiations towards achieving a global resolution of all the issues relating to Time Warner's carriage of various ABC programming services, including the ABC O&O Stations. However, they would not be continually diverted by the sword of Damocles atmosphere created by ABC's

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<sup>5</sup>47 C.F.R. § 76.309(c)(3)(i)(B).

<sup>6</sup>As just one example, Time Warner's Bakersfield, California division has been forced to run between three and six notices in a half dozen local newspapers alerting subscribers to the disruption in their service being threatened by ABC. See Exhibit N.

<sup>7</sup>Wall Street Journal, April 26, 2000, B6.

tactic of relegating Time Warner to a tenant at sufferance. Time Warner requested a response to its proposal by noon on Monday, April 24.

ABC failed to accept Time Warner's good faith suggestion of a reasonable cooling off period by the Monday deadline. Instead, ABC again changed the terms of its substantive proposal relating to the carriage of various ABC-controlled cable networks, and demanded a quick answer. Time Warner delivered a substantive response to ABC's request on Wednesday, April 26. At the same time, Time Warner renewed its offer to an extension of retransmission consent running through the end of the year. (Exhibit A).

In a letter which was apparently being delivered to Time Warner contemporaneously with Time Warner's April 26 correspondence to ABC described above, ABC tendered yet another short-term retransmission consent agreement amendment offer to Time Warner, but this time it was for even less than a month. (Exhibit P). Rather, the offer was for a mere 24 days, expressly designed to extend through the May audience sweeps period.<sup>8</sup> But at this point, ABC had been placed on notice that such brinkmanship tactics would no longer be tolerated.

Indeed, on April 28, Time Warner responded to ABC's April 26 letter, again expressing Time Warner's unwillingness to agree to further short-term extensions and urging ABC to avoid viewer disruption by agreeing to a more rational extension through the end of the year:

Time Warner Cable believes that short-term retransmission consent agreements such as the one you propose are counterproductive; they create continued and unnecessary frustration and uncertainty on the part of our customers - - your viewers. It was for this reason that our April 26<sup>th</sup> offer to ABC (as well as our offer of April 19<sup>th</sup>) contemplated a retransmission consent agreement that runs through the end of the year. This will

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<sup>8</sup>Acknowledging the fact that any retransmission consent agreement, to be valid, must be executed by both parties, ABC's offer included a signature line for Time Warner.

provide our customers and your viewers with the certainty they expect, and provide us ample time to resolve our commercial differences.

We no longer feel it is appropriate or in the best interests of our customers for us to enter into another short term agreement, and we again urge you to sign and return to us the retransmission consent agreement we forwarded on April 26<sup>th</sup>. (Exhibit Q).

ABC's response to Time Warner's April 28 letter was received late that same day. In its response, ABC asserted that its April 26 amendment proposal, which was clearly identified as such and which provided (as had every prior extension proposal) a signature line for Time Warner to acknowledge that the amendment was "Accepted and Agreed to," was not an amendment proposal at all. Rather, ABC contended that the documents tendered Time Warner on April 26 constituted a unilateral, "unconditional" grant of retransmission consent authority through May 24, 2000. (Exhibit R).

On April 29, Time Warner replied to ABC's incredibly tortured assertion by noting that ABC's claim that it had offered an "unconditional" extension of the terms and conditions of the August 9, 1993 Retransmission Consent Agreement was unfounded, and that ABC's offer in fact included terms and conditions unacceptable for Time Warner. (Exhibit S). Time Warner again urged ABC to sign Time Warner's proposed agreement, thereby guaranteeing uninterrupted carriage of the ABC O&O Stations by Time Warner cable systems through the end of the year.

On April 30, ABC tendered its "unconditional and unequivocal consent to retransmit the broadcast signals transmitted by ABC owned-and-operated stations through May 24, 2000, regardless of any extension of the retransmission consent agreement." (Exhibit T). In other words, ABC proposed to allow the preexisting retransmission consent agreement to expire, and offered instead its unilateral "grant" of retransmission consent.

Time Warner promptly replied later that same day, again pointing out that ABC's proposal was not unconditional; to the contrary, ABC continued to insist that any such consent be for an extremely limited period, expiring at the end of the May sweeps (May 24), a condition that Time Warner had repeatedly told ABC was unacceptable. (Exhibit U). If ABC's offer had truly been unconditional, it would have had to extend throughout the retransmission consent cycle, *i.e.*, through December 31, 2002. Moreover, as an "unconditional" offer, it would have to be viewed as affording Time Warner complete discretion in deciding whether, how, where and when to carry the ABC O&O Stations.

Time Warner also reminded ABC, as it had advised ABC when a similar situation arose during the February sweeps, that Section 76.58(a) of the Commission's rules cannot logically apply after the expiration of a retransmission consent contract. Time Warner further noted that a unilateral offer of retransmission consent was invalid, and that the ABC O&O Stations waived their right to unilaterally mandate carriage when they elected retransmission consent instead of must carry. In addition, Time Warner reminded ABC that the expiration of the retransmission consent agreement during an ongoing sweeps period was due solely to the fact that ABC insisted on such expiration date in the previous extension agreement, just one month earlier. Time Warner again renewed its offer of a reasonable retransmission consent agreement that would guarantee the ability of Time Warner subscribers to continue to receive the ABC O&O Stations through the end of the year, while the parties continued their negotiations in a less highly charged atmosphere.

ABC's response to Time Warner's letter came late in the evening on April 30 and simply confirmed that ABC's position was unshakable - - it would not consider agreeing to give Time

Warner retransmission consent for any period longer than the May sweeps. (Exhibit V). Time Warner replied, expressing its regrets as to ABC's decision, and offered to stay by the phones in case ABC had a change of heart. (Exhibit W). ABC's call never came.

By refusing to agree to Time Warner's reasonable, good faith offer of an extension through the end of the year, when the stroke of midnight on April 30 arrived, ABC ensured that there was no longer any retransmission consent agreement in place, and, like the fabled carriage that turned into a pumpkin, Time Warner's carriage authority with respect to the ABC O&O Stations vanished.

## ARGUMENT

### **I. Section 325(b)(1) Prohibits Time Warner From Retransmitting The ABC O&O Stations Following The Expiration of Time Warner's Retransmission Consent Agreement With ABC.**

Section 325(b)(1) of the Communications Act makes it unlawful for a cable television system to retransmit the signal of any local commercial television broadcast station that has elected to exercise its retransmission consent rights, in lieu of its must carry rights, without an express agreement between the station and cable system authorizing such retransmission.<sup>9</sup>

Section 325(b)(1) provides, in relevant part, as follows:

- (b)(1) Following the date that is one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except -
  - (A) with the express authority of the originating station; or

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<sup>9</sup>As shown below, ABC's unilateral and unenforceable "grant" of retransmission consent was invalid, and thus inadequate to satisfy the requirements of Section 325(b)(1) of the Act or Section 76.64 of the Commission's rules.

- (B) pursuant to Section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

The FCC rule implementing this statutory section similarly states that “no multichannel video programming distributor shall retransmit the signal of any commercial broadcasting station without the express authority of the originating station.” 47 C.F.R. § 76.64(a). As noted above, the retransmission consent agreement between ABC and Time Warner unquestionably expired at 12:01 am, May 1. After that moment, Time Warner had no choice but to suspend retransmissions of the ABC O&O Stations. To have done otherwise would have exposed Time Warner to severe penalties, both under the Communications Act and for copyright infringement.

Specifically, the FCC has clearly stated its authority and its intent to punish violations of the retransmission consent provisions, noting that “properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture.” Initial Must-Carry Order at ¶ 175. Furthermore, under Section 111(c) of the Copyright Act of 1976, 17 U.S.C. §111(c), cable operators are eligible for a “compulsory” copyright license, and thus immunized from copyright liability, in connection with the carriage of certain broadcast signals, so long as the statutory criteria (including the payment of appropriate compulsory license fees) are satisfied. However, Section 111(c)(2) goes on to provide that:

the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission... and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by section 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; ...<sup>10</sup>

The Copyright Act provides substantial penalties for infringement, including statutory damages of between \$750 to \$30,000, and up to \$150,000 in the case of “willful” infringement.<sup>11</sup> Section 506 of the Copyright Act also provides for criminal penalties including fines and/or imprisonment in cases where the infringement is made “willfully and for purposes of commercial advantage or private financial gain...”<sup>12</sup>

Finally, and not insignificantly, the Copyright Act provides standing to bring an infringement action not only to the broadcast station whose signal has been unlawfully retransmitted,<sup>13</sup> but to the legal or beneficial owner of the copyright covering any of the programming broadcast by that station.<sup>14</sup> Thus, even if ABC were estopped from bringing an infringement action against Time Warner on account of its “unilateral” offer of retransmission consent, the continued retransmission of the ABC O&O Stations absent an effective agreement conferring the necessary consent under Section 325 of the Communications Act would nevertheless expose Time Warner to considerable copyright liability from the owners of the multitude of copyrighted television programs broadcast by the ABC O&O Stations.

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<sup>10</sup>17 U.S.C. §111(c)(2). As explained in Section III above, retransmission of a broadcast signal without a valid retransmission consent agreement, executed by both parties, would violate both Sec. 325(b)(1) of the Act and Sec.76.64(a) and (k) of the FCC rules.

<sup>11</sup> 17 U.S.C. §504(c).

<sup>12</sup> 17 U.S.C. §506(a).

<sup>13</sup> 17 U.S.C. §501(c).

<sup>14</sup> 17 U.S.C. §501(b).

**II. Section 614(b)(9) Has No Applicability Upon The Expiration Of A Retransmission Consent Agreement.**

ABC argues that, despite the admitted fact that there is no enforceable retransmission consent agreement between it and Time Warner, and despite the fact that Time Warner would be exposed to substantial liability under both the Communications Act and the Copyright Act if it had continued to carry the ABC O&O Stations after the expiration of the retransmission consent agreement at 12:01 am on May 1, Time Warner's decision to comply with Section 325(b)(1) constituted a violation of Section 614(b)(9) of the Act.

As will be shown below, plain statutory language dictates that Section 614(b)(9), and all other provision of Section 614, are simply inapplicable to a station electing retransmission consent. And, it is not at all clear that the Commission has ever actually decided whether the "sweeps" clause, as opposed to the "notice" clause, of Section 614(b)(9) applies during the term of a retransmission consent agreement.

Section 614(b)(9) provides, in relevant part, as follows:

A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations.

The FCC has adopted a parallel provision as a note to Section 76.58(a) of its rules:

**NOTE:** No deletion or repositioning of a local commercial television stations shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods - - generally including February, May, July and November - - commonly known as audience sweeps.

As a preliminary matter, it is important to stress that Section 614(b)(9) is subsumed within Section 614 of the Communications Act, which deals exclusively with mandatory

carriage rights for certain local commercial television stations. Significantly, Section 325(b)(4) of the Act states that

[i]f an originating station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of Section 614 shall not apply to the carriage of the signal of such station by such cable system.

Thus, based on a plain reading of these two statutory provisions, it is evident that the restriction against “deletion or repositioning” during a sweeps period is simply inapplicable to a station that has elected retransmission consent, since it is one of the “provisions of Section 614” that does not apply when a station elects retransmission consent.

Time Warner is aware that, at ¶ 171 of the Initial Must Carry Order, the Commission indicated that Section 614(b)(9), along with a litany of other provisions in Section 614 (§§ 614(b)(3)(A), 614(b)(3)(B) and 614(b)(4)(A)) all apply to retransmission consent stations as well as must carry stations.<sup>15</sup> ABC asserts that the Commission did not reach this conclusion “lightly,” but rather devoted “several paragraphs” to the “explicit consideration” of why the “prohibition against dropping a local commercial television station during audience sweeps covered broadcast stations carried pursuant to retransmission consent agreements.”<sup>16</sup>

ABC’s characterization of the Commission’s discussion of this issue is misleading in the extreme. In fact, the “several paragraphs” referred to by ABC (¶¶ 164-170) were devoted to the applicability of Section 614(b)(3)(B), the “carriage in the entirety” provision, to retransmission consent stations. The other provisions, including Section 614(b)(9), were then merely swept in

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<sup>15</sup>Report and Order in MM Docket Nos. 92-259 et al., 8 FCC Rcd 2965, ¶171 (1993) (“Initial Must Carry Order”).

<sup>16</sup> Petition at 8.

at ¶ 171, with absolutely no analysis or discussion why the policies of that section should apply to a situation where such matters could be freely negotiated among the parties in their retransmission consent agreement. In this regard, it is important to recognize that Section 614(b)(9) contains two separate clauses, the “sweeps” clause and the “notice” clause. The policies of these two clauses were in fact separately analyzed in paragraphs 109 and 110 of the Initial Must Carry Order. In ¶ 109, the analysis of the “sweeps” clause, the Commission stated as follows:

[A]s we proposed in the Notice, the rules will prohibit deleting or repositioning of must-carry signals during any of the four annual sweeps periods. . . . Thus, we will prohibit the deletion and repositioning of must-carry signals during these four time periods. (emphasis supplied).

In contrast, when discussing the “notice” clause of Section 614(b)(9) at ¶ 110, the Commission stated that “the notification requirements are not limited to must-carry signals alone.”<sup>17</sup>

Given the lack of reasoned explanation in ¶ 171, it is entirely unclear whether the Commission intended the “notice” clause of Section 614(b)(9) to apply to retransmission consent stations, or the “sweeps” clause, or both.

From the foregoing, the applicability of the “sweeps” clause of Section 614(b)(9) to a station that has elected must carry is ambiguous at best. Indeed, Time Warner notes that ABC itself does not contend that Section 614(b)(9) applies to stations being carried pursuant to a valid retransmission consent agreement. Such an application, according to ABC, would render the rule meaningless, because protection against being dropped during sweeps would be unnecessary

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<sup>17</sup> Initial Must Carry Order, ¶ 110, n. 323.

where such protection is already provided under a valid contract.<sup>18</sup> Rather, ABC insists that Section 614(b)(9) applies in one and only one situation - - where a retransmission consent agreement expires by its own terms in the midst of a sweeps period.

The fallacy in ABC's argument is apparent when the applicability of Section 614(b)(9) to stations electing must carry is compared to its potential applicability to stations electing retransmission consent. There is no dispute that Section 614(b)(9) applies to local commercial television stations that have elected must carry (affirmatively or by default). In the case of a station being carried pursuant its must carry rights, the rule suffers from the same lack of necessity raised by ABC with respect to its applicability during a retransmission consent contract - - if the station is dropped during a sweeps period, the station could always rely on its must carry remedies under Sec. 614(d). However, the rule has very significant applicability in the case of a station that has elected must carry, but is being carried voluntarily, rather than in fulfillment of the must carry requirements of Sec. 614, *e.g.*, because the cable system is already carrying its quota of must carry stations, or because the station "substantially duplicates" another must carry station or is a duplicate network affiliate.<sup>19</sup> Under such circumstances, if the station were dropped during sweeps, its only remedy would be under Section 614(b)(9), since it is not entitled to a remedy under must carry.

To the extent that Section 614(b)(9) applies at all to broadcast stations electing retransmission consent, its applicability would be very similar to the must carry scenarios described above. Where a retransmission consent agreement both authorizes and creates a duty

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<sup>18</sup> Petition, n. 25.

<sup>19</sup> See Sections 614(b) and (b)(5) of the Act.

to carry, dropping the station during sweeps would simply provide two remedies, just as in the case of the must carry station. It is not uncommon, however, for a retransmission consent agreement to allow, but not mandate, carriage.<sup>20</sup> Thus, Section 614(b)(9) provides the sole remedy for deletion or repositioning of a voluntarily carried retransmission consent station during a sweeps period under such circumstances, just as in the case of a voluntarily carried “over-the-quota” or “substantially duplicative” must carry station.

Thus, while Time Warner disputes the legal applicability of Section 614(b)(9) to a station that has elected retransmission consent, it is beyond dispute that there are circumstances where such a rule might logically apply during the term of a retransmission consent agreement. However, Section 614(b)(9) cannot logically apply to the discontinuance of carriage following the expiration of the retransmission consent agreement that authorized carriage in the first place. Otherwise, the rule would simply serve to extend a retransmission consent agreement beyond the termination date freely and mutually agreed upon by both parties. It simply is inconceivable that Congress intended Section 614(b)(9) to work such an extraordinary abrogation of private contractual terms given the absence of either clear statutory language or extrinsic legislative history supporting such a conclusion. Moreover, as explained above, Section 614(b)(9) speaks only to a voluntary “deletion or repositioning” during sweeps. Upon the expiration of a retransmission consent agreement, the cable operator has no legal authority to continue to carry the broadcast station’s signal and the discontinuation of carriage under such circumstances is thus not a voluntary “deletion” by the operator.

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<sup>20</sup>Indeed, Time Warner has entered into numerous such retransmission consent agreements.

Finally, and most significantly, mandated carriage under such circumstances would be standardless, and thus unenforceable. Without a bilateral agreement as to the applicable terms and conditions, carriage is unworkable because neither party can know the terms of carriage as to matters such as indemnification, effects on other programming agreements for other channels that may have been covered by the previous agreement, promotional obligations, etc. How long would such a consent last? What other terms and conditions would apply? Would such a grant of consent create a right for the cable operator to carry, but not an obligation to carry? Could the broadcaster withdraw its consent at any time? These and other unanswered questions compel the conclusion that a retransmission consent contract must be agreed to by both parties to satisfy the requirement of Section 325(b)(4) of the Act and Section 76.64 of the Commission's rules. If disputes arose as to such issues, it would be impossible for the Commission or a court to resolve them. This lack of guidance clearly shows that Congress did not intend the sweeps rule to apply after the expiration of a retransmission consent agreement.

Indeed, such open issues have a very significant impact on the matter now before the Commission. ABC concedes, as it must, that the previous retransmission consent agreement between the parties has expired, but ABC nevertheless seeks to compel carriage through the May sweeps. If so, under what terms and conditions? For example, the previous agreement provided a clause covering after-acquired systems by Time Warner and after-acquired stations by ABC. If Time Warner closes on the acquisition of additional systems, will they have retransmission consent from ABC, now that this issue is no longer covered by a valid contract? Even more significantly, the prior retransmission consent agreement included an indemnification by ABC to protect Time Warner as to tortious acts by ABC relating to "libel, slander, defamation, invasion

of the right of privacy or publicity, or violation or infringement of copyright.” If Time Warner were forced to carry the ABC O&O Stations now, it would be exposed to massive potential tort liability, without the protection of the indemnification clause agreed to by the parties in their now expired retransmission consent contract. Indeed, Time Warner would never agree to a retransmission consent agreement lacking such fundamental protections, yet ABC would force Time Warner to carry its O&O Stations and assume full exposure.

In short, if Section 614(b)(9) applies at all to stations that have elected retransmission consent, it logically only restricts “deletion or repositioning” during the term of the applicable retransmission consent agreement, not after such agreement has expired. This conclusion is particularly inescapable here, where ABC knowingly and voluntarily demanded that Time Warner enter into a short-term extension of the retransmission consent agreement which specifically provided that Time Warner’s authority for continued carriage would expire one month later, during a sweeps period.

### **III. ABC Cannot Unilaterally Compel Time Warner To Carry Its Stations By Means Of An Allegedly “Unconditional” Grant of Retransmission Consent**

Although ABC’s principal contention is that Section 614(b)(9) applies only where a retransmission consent agreement expires during a sweeps period, it also argues that its alleged grant, on a completely unilateral basis, of “unconditional” consent for Time Warner to carry ABC’s stations compels Time Warner to continue carriage of those stations for the 24-day specified in that “unconditional” grant. ABC’s position would effectively erase the distinction between must carry and retransmission consent and, therefore, must be rejected. Indeed, ABC’s position would create three options for broadcasters: must carry, retransmission consent, and “mini-must carry”, *i.e.*, a right to mandatory carriage during sweeps even without a valid

retransmission consent agreement. As shown below, this is not the regime Congress enacted in establishing the must carry/retransmission consent election, and the courts have never upheld such a “mini-must carry” scheme.<sup>21</sup>

Once a local commercial station elects retransmission consent, it relinquishes any right to mandatory carriage. Indeed, such a station runs the risk that if a retransmission consent agreement acceptable to both parties cannot be reached, the cable operator will have no authority to retransmit the station. Congress anticipated this scenario by noting that

Section 325 makes clear that a station electing to exercise retransmission consent with respect to a particular cable system will thereby give up its rights to signal carriage and channel positioning established under section 614 and 615 [the must-carry provisions] for the duration of the 3-year period. Carriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system.

Senate Report at 37.

As noted above, in establishing the must carry/retransmission consent election, Congress intended to give local television stations a choice.<sup>22</sup> Those stations fearing that their programming might not have sufficient popular appeal to otherwise merit cable carriage were given the ability to guarantee carriage by electing must carry. On the other hand, those more popular stations believing that they might be able to extract consideration from cable operators in return for the right to carriage were given the option to elect retransmission consent. Indeed,

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<sup>21</sup>See Section IV, *infra*.

<sup>22</sup> See 47 U.S.C. § 325(b)(3)(B) [“The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under Section 614.”]

the FCC recognized that strong television stations would welcome the opportunity to negotiate for retransmission consent in the open market:

Strong television stations having the potential for gaining retransmission consent revenues would forfeit their negotiating opportunities if they did not make an affirmative election of retransmission consent.<sup>23</sup>

But such stations were placed on notice that by electing retransmission consent, they were foregoing the right to mandatory carriage for a three-year period, until the next election cycle arrives. Thus, if they were unable to enter into a mutually acceptable retransmission consent agreement with the cable operator for any reason, such as making overly greedy demands for consideration or overestimating the popularity of their programming, the station would risk not being carried by such cable system.

If a station could elect retransmission consent and then force a cable operator to carry the station by proffering a unilateral grant of consent, the carefully balanced statutory retransmission consent/must carry election scheme would be undermined. A station could elect retransmission consent and then make unrealistic and unreasonable demands for consideration, safe in the knowledge that if the cable system did not accede to the broadcaster's demands, the broadcaster could always unilaterally offer retransmission consent for "free" and thereby guarantee carriage.

Moreover, ABC's unenforceable, unilateral offer of retransmission consent was not unconditional in that it would give Time Warner consent only for a limited portion of the 1/1/00 - 12/31/02 retransmission consent cycle, *i.e.*, through May 24, 2000, a condition that ABC knew was flatly unacceptable to Time Warner.

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<sup>23</sup>Initial Must Carry Order, ¶159.

Furthermore, a unilateral offer of retransmission consent simply does not satisfy the requirements of Sec. 325(b)(1) of the Act or Sec. 76.64 of the FCC's rules. The process of obtaining retransmission consent from a broadcast station necessarily entails negotiations between the station and the cable system. Section 76.64(k) of the FCC's rules instructs that the end result of such negotiations will be a written contract between the parties, noting that "[r]etransmission consent agreements between a broadcast station and a multichannel video programming distributor shall be in writing . . ." 47 C.F.R. § 76.64(k). With respect to such negotiations, in implementing Section 325(b), the FCC stated its belief that "there are incentives for both parties to come to mutually-beneficial arrangements." Memorandum Opinion and Order in MM Docket No. 92-259, 9 FCC Rcd 6723, ¶ 115 (1994). However, the legislative history is clear that by enacting the current Section 325(b) of the Communications Act, Congress intended solely to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend "to dictate the outcome of the ensuing marketplace negotiations." S. Rep. No. 92, 102d Cong., 1<sup>st</sup> Sess. 36 (1991) ("Senate Report").

In sum, the ABC O&O Stations waived their right to unilaterally mandate carriage when they elected retransmission consent instead of must carry. Nor can ABC rely on Section 614(b)(9) to compel carriage where the underlying legal basis of such carriage is an alleged "unconditional" grant of consent. An unconditional grant must be just that - - lacking any conditions that would impose any enforceable obligations on the recipient of the grant.

#### **IV. ABC Fails the Tests for Extraordinary Relief.**

- A. ABC has Shown Neither That the Balance of Hardships Tips in its Favor Nor That it Will Be Irreparably Injured If the Commission Fails to Order Time Warner Cable to Carry its O&O Stations.

ABC's failure to succeed on the merits is demonstrated fully above. However, ABC also fails the second and third elements of the *Holiday Tours*<sup>24</sup> test, which it says applies to its request for extraordinary relief from the Commission. The sincerity of ABC's arguments that the balance of hardships tips in its favor and that it will be irreparably injured absent unprecedented intervention by the Commission in these private, commercial negotiations must be tested in light of its past conduct in the events that led up to the present circumstance. It was ABC's decision

-- not Time Warner's -- that the most recent extension of the retransmission consent agreement would expire in the middle of the May sweeps. It was ABC's decision -- not Time Warner's -- to reject Time Warner's offer to extend the prior retransmission consent agreement through the end of this calendar year. Finally, it was ABC's decision -- not Time Warner's -- to wait until after the last minute to seek relief when it knew well in advance that Time Warner was not going to agree any more short-term extensions.

A tribunal "may legitimately think it suspicious that the party who asks to preserve the status quo through interim injunctive relief has allowed the status quo to change through unexplained delay." Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1092 n.27 (3d Cir. 1984). While such delay in seeking preliminary relief is not, by itself, determinative in whether the grant of interim relief is just and proper, it is relevant in determining whether such relief is truly necessary. See Miller v. Calif. Pacific Medical Center, 991 F.2d 536, 544 (9th Cir. 1993). A plaintiff's "delay before seeking a preliminary injunction implies a lack of urgency and

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<sup>24</sup>*Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

irreparable harm.” Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1377 (9th Cir. 1985).

It would be reasonable to conclude that ABC is crying “wolf” when it professes to be irreparably injured by Time Warner’s failure to carry ABC’s O&O Stations, since ABC holds the key to ending its so-called predicament by accepting Time Warner’s offer to an interim agreement lasting anywhere from five-and-one-half months to ten years, at ABC’s election. In situations where the moving party’s own actions have resulted in the outcome they find unacceptable, the court “must conclude that such an outcome is not an irreparable injury. If the harm complained of is self-inflicted, it does not qualify as irreparable.” Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 839 (3d Cir. 1995); see also San Francisco Real Estate v. Real Estate Investment Trust of America, 692 F.2d 814, 818 (1st Cir. 1982) (harm suffered was largely self-inflicted and, as such, “it was not only not irreparable in the absence of the district court’s order, but entirely avoidable”); FIBA Leasing Co. v. Airdyne Industries, Inc., 826 F. Supp. 38, 39 (D. Mass. 1993) (“preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted”); 11A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure, § 2948.1 (1995). Thus, where ABC has refused to accept Time Warner’s offer of an extension of their retransmission consent agreement, it has created its own harm. Such harm is not irreparable; rather, ABC can protect itself from the harm it is experiencing. Because a remedy other than the grant of an injunction exists for ABC’s alleged harm, an injunction is not warranted. See Caplan, 68 F.3d at 839.

Moreover, it is Time Warner that will suffer hardship if the Commission orders carriage for another three weeks. It has been forced to explain these imminent programming changes to its subscribers and, in accordance with the Commission's Rules, to give them a series of 30-day program change notices to that effect. It is neither surprising nor reasonably open to criticism that Time Warner decided to accept no more of ABC's efforts to damage Time Warner's relationship with its subscribers due to ABC's brinkmanship and short-term retransmission consent agreement extensions. Faced with the termination of its retransmission consent agreement with ABC, Time Warner has taken appropriate steps to procure substitute programming. If the Commission grants ABC's Petition, the substitute programming will be removed for three weeks to allow ABC's O&O Stations back on the cable systems, only to be replaced again after May 24 if there is no agreement. The Commission should not be a party to this effort by ABC to make yo-yo's out of Time Warner's subscribers.

Finally, it is ironic that ABC, a media owner and outlet, would enlist the aid of a government agency in compelling Time Warner to carry its O&O Stations' programming. Unmentioned by ABC is the fact that the action it requests raises a significant issue under the First Amendment. The Commission should recognize that, while must-carry survived a facial Constitutional attack in *Turner Broadcasting*<sup>25</sup>, that decision did not grant the Commission *carte blanche* to dictate cable operators' program choices, even with respect to broadcast television stations. First, the Supreme Court's prior *Turner Broadcasting*<sup>26</sup> decision re-affirmed the

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<sup>25</sup>*Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (hereinafter cited as *Turner II* at \_\_\_.)

<sup>26</sup>*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (hereinafter cited as *Turner I* at \_\_\_.)

general principle that “[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the First Amendment.”<sup>27</sup>

Secondly, as the Supreme Court reiterated in *Turner I*, “Government action that . . . requires the utterance of a particular message favored by the Government, contravenes this essential right [that “each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence”].<sup>28</sup> Regulations that “compel speakers to . . . distribute speech bearing a particular message” are subject to strict scrutiny and are presumptively invalid unless they can be shown to promote a compelling interest and are narrowly tailored to further that interest.<sup>29</sup> This principle animates a series of Supreme Court decisions striking down various kinds of speech mandated by the Government.<sup>30</sup> Indeed, Time Warner itself was involved in a situation similar to this one where a municipal government attempted to compel it to carry Fox News Channel, a commercial news channel that Time Warner otherwise chose not to carry. The federal court in New York that heard the case enjoined the City of New York from taking any actions to compel such carriage.<sup>31</sup>

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<sup>27</sup>*Turner I*, 114 S.Ct. at 2456; citation omitted.

<sup>28</sup>*Turner I*, 114 S.Ct. at 2458.

<sup>29</sup>*Turner I*, 114 S.Ct. at 2459; *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

<sup>30</sup>*Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781 (1988); *Pacific Gas and Electric Co. v. Public Utilities Comm’n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

<sup>31</sup>*Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357 (S.D. N.Y. 1996), *aff’d on other grounds*, 118 F.3d 917 (2<sup>nd</sup> Cir. 1997).

Even if the action ABC requests is subject only to the “intermediate scrutiny” that the Supreme Court applied to the must-carry statutory scheme as a whole, such scrutiny requires a showing of an “important or substantial governmental interest unrelated to the suppression of free speech, provided that the incidental restrictions did not ‘burden substantially more speech than is necessary to further’ those interests.”<sup>32</sup> The Court identified as “important governmental interests” the preservation of free, over-the-air broadcast television, the promotion of the widespread dissemination of information from multiple sources and the promotion of fair competition in the market for television programming.<sup>33</sup>

None of these factors apply here. First and foremost, this mandated carriage that ABC requests is *not* pursuant to the 1992 Cable Act’s must-carry provisions. This is not a case of a cable operator refusing to carry a must-carry station. This is a case of a cable operator being legally barred from carrying a broadcast station that has formally elected retransmission consent (and, by operation of Section 325(b)(4) of the Communications Act, that has relinquished its must-carry rights provided by Section 614 of the 1992 Cable Act) in the absence of an executed agreement to do so. So, one cannot say that the governmental interest being vindicated here is merely the enforcement of the must-carry regime. The channel formerly occupied by ABC’s O&O Stations is *not* one for which Time Warner has been deprived of editorial control, pursuant to must-carry or any of the 1992 Cable Act’s other, similar provisions.<sup>34</sup>

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<sup>32</sup>*Turner II*, 520 U.S. at 186; quoting *Turner I*, 114 S.Ct. at 2469.

<sup>33</sup>*Turner II*, 520 U.S. 189, citing *Turner I*, 114 S.Ct. at 2469.

<sup>34</sup>Leased access channels (Section 612) and PEG channels (Section 611).

Second, even ABC does not claim – because it cannot – that the failure of Time Warner Cable to carry its O&O Stations on Time Warner’s systems in the Stations’ home DMAs threatens their existence, let alone the future of free over-the-air broadcasting. Necessarily, when ABC elected retransmission consent over must-carry, it assumed the risk that it and Time Warner would not reach an agreement, with the entirely foreseeable consequence that its Stations would not appear on Time Warner’s systems. At most, this proceeding is about the timing of when that carriage ends, not about whether it will be continued indefinitely.

Third, ABC can not seriously claim that this is part of some anticompetitive scheme. Indeed, in rejecting the facial challenge to must-carry, even the Supreme Court acknowledged, “Broadcasters with stronger finances tend, however, to be popular ones that ordinarily seek payment from cable systems for transmission, *so their reliance on must-carry should be minimal.*”<sup>35</sup> As ABC implicitly recognized when it elected retransmission consent for its O&O stations, it – not Time Warner – has the upper hand at the negotiating table. Were it otherwise, ABC would have availed itself of the benefits of must-carry. Moreover, as already has been discussed elsewhere, Time Warner’s resistance is *not* to the idea of even provisional carriage, pursuant to an agreement, while it continues to negotiate a long-term retransmission consent agreement with ABC. Certainly Time Warner has not expressed an absolute refusal to carry the Stations under all circumstances. Rather, Time Warner rejects the idea that, without an agreement, it can be required to carry ABC’s O&O Stations’ for three weeks, *purely for their convenience and commercial benefit during sweeps*, when there is no agreement for carriage thereafter.

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<sup>35</sup>*Turner II*, 520 U.S. at 217.

B. The Public Interest Does not Favor Compelled Carriage of ABC's O&O Stations' Signals During the May Sweeps.

In arguing that "Time Warner subscribers will be denied the opportunity to view such ABC programming as the *Celebrity Who Wants to be a Millionaire* . . ." <sup>36</sup>, ABC is being both hypocritical and incorrect. It is being hypocritical because the "injury" to the public from a lack of cable carriage of ABC's O&O Stations during a ratings period is no greater than at any other time; yet ABC has already expressed an unwillingness to enter into an agreement with Time Warner that maintains carriage until the end of this calendar year. While ABC says the public interest demands that its O&O Stations' programming not be taken off Time Warner's systems during the sweeps, it continues to reserve for itself the right to take such programming off the day after the sweeps are over. In short, stripped of its camouflage, ABC's argument is that the public interest requires that its O&O stations' programming be carried on Time Warner's systems *for approximately three weeks and no more*. Clearly that is not the case.

ABC's television programming is not indispensable, nor are Time Warner's customers "denied the opportunity to view such . . . programming." They simply will not see that station over Time Warner's systems until either Time Warner and ABC execute a retransmission consent agreement or ABC's O&O Stations elect must-carry under Section 325 of the Communications Act. The fact is that these subscribers can watch the ABC O&O Stations by viewing them off the air. The great majority of televisions sold in the last five years have multiple antenna inputs that can be switched with the remote control as easily as changing channels.

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<sup>36</sup>Petition at 13.

Moreover, the ABC O&O Stations are but one program source among the multiple options offered by Time Warner. Time Warner subscribers will still have a range of choices of news, sports, entertainment and weather – from local as well as national sources. While it is undeniable that the ABC O&O Stations make a contribution to the overall marketplace of ideas and entertainment in their respective markets, that contribution is neither unique nor indispensable to the public. Analytically, this situation is little different than if, in a city where there are 50 grocery stores, one of them closed down. In that circumstance, no one would seriously argue that the public interest required that the 50<sup>th</sup> store be re-opened; and the result should be no different here.

Finally, the Commission should not forget that Congress, by establishing the retransmission consent/must carry scheme of cable signal carriage regulation, clearly contemplated the possibility that not every station that elected retransmission consent would successfully reach an agreement with every cable company in its local market. Likewise, by allowing broadcasters to elect retransmission consent only during a window that opens once every three years, Congress created a situation in which it was possible for the cable-viewing public to lose access to one or more broadcast television signals in the event a broadcaster and a cable operator failed to reach a retransmission consent agreement. Under the regime established by Congress -- and the Commission -- absent such an agreement, the members of the public who subscribed to that cable company would be “deprived” of that station’s signal for a period of up to three years.

By contrast, implicit in ABC’s request to the Commission is the assumption that, sooner or later, every local station will be carried by every cable system in that station’s home market --

either under must-carry or retransmission consent -- and therefore the public interest demands that delivery of these stations' signals to subscribers not be interrupted while the broadcaster decides just how much the cable operator is going to pay for this privilege. This assumption is patently false. If the Congress had determined that the *public* interest required cable carriage of every local broadcast television signal, then it would not have established retransmission consent in the 1992 Cable Act. Likewise, if the Commission had determined that the *public* interest required such carriage, then it would have allowed broadcasters to elect must-carry at any time, rather than only once every three years. Under those circumstances, whenever a broadcaster and a cable operator failed to reach agreement, the broadcaster could elect must carry; and service to the public would continue without interruption.

It is clear that the interest that ABC is asking the Commission to vindicate here is not the public's interest in uninterrupted cable reception of ABC's O&O Stations' programming. If this were the interest that ABC was asking the Commission to protect, then it would ask the Commission to order Time Warner to continue carriage of the signals of ABC's O&O Stations indefinitely until the parties reached an agreement. Given that this indefinite extension is clearly not what ABC desires (indeed ABC has rejected Time Warner's proffered extension to the end of the calendar year), it is *the interest of the ABC O&O Stations in maximizing their audience during rating period that ABC is asking the Commission to protect*. While that interest may be significant to ABC, it is a matter of indifference to the public.

#### **CONCLUSION**

ABC had many options open to it, provided by statute and FCC regulation, all of which would have guaranteed carriage for the ABC O&O Stations during the May sweeps. It could have elected "must carry" status last fall, but it declined to do so, choosing instead the potentially more lucrative - - but also more risky - - retransmission consent option. It could have agreed to Time Warner's offer to extend the expired retransmission agreement through the end of the year, thereby guaranteeing carriage for its viewers while the parties continued to negotiate, but it decided not to. Or, when the parties last agreed to extend the retransmission consent through April 30, ABC could have agreed instead to an extension through the end of May. Again, it chose to take a more aggressive tack.

ABC had every right to make the decisions it did. However, those decisions have resulted in the parties having neither a statutory relationship - - pursuant to must carry - - nor a contractual relationship - - pursuant to retransmission consent - - as the May sweeps proceed. ABC can't have it both ways. Having made its election, ABC cannot now avail itself of the benefits to which it otherwise may have been entitled, had it made different decisions.

The Commission should deny the Petition.

Respectfully submitted,

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Dated: May 2, 2000

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